



STATE OF WISCONSIN Division of Hearings and Appeals

In the Matter of

Outagamie County Department of Human Services, Petitioner

vs.

██████████, Respondent

DECISION

Case #: FOF - 206513

Pursuant to petition filed October 7, 2022, under Wis. Admin. Code §HA 3.03, and 7 C.F.R. § 273.16, to review a decision by the Outagamie County Department of Human Services to disqualify ██████████ from receiving FoodShare benefits (FS) for a period of one year, a hearing was held on Thursday, January 5, 2023 at 01:15 PM by teleconference initiated from Madison, Wisconsin. The hearing was first scheduled for November 17, 2022. At that time, Respondent appeared but explained that he was homeless, checking out of a motel, and asked that the hearing be rescheduled. His request was granted.

The issue for determination is whether the respondent committed an Intentional Program Violation (IPV).

There appeared at that time the following persons:

PARTIES IN INTEREST:

Petitioner:

Outagamie County Department of Human Services
320 S Walnut St
Appleton, WI 54911-5985
By: Alicia Grube

Respondent:

██████████
████████████████████
████████████████

Did Not Appear

ADMINISTRATIVE LAW JUDGE:

Teresa A. Perez
Division of Hearings and Appeals

FINDINGS OF FACT

1. The respondent (CARES # [REDACTED]) is a resident of Winnebago County who received FS benefits from March 2015 through July 2015 and from October 2020 through November 2021.
2. On July 22, 2022, Respondent swiped a FS card that did not have anyone's name on it to complete two purchases at WalMart. He was accompanied by his girlfriend, [REDACTED], who handed him the card.
3. The card that Respondent swiped on July 22, 2022 was issued to an individual with the initials [REDACTED] but the food that was purchased was not intended for [REDACTED]
4. On October 10, 2022, the petitioner prepared an Administrative Disqualification Hearing Notice alleging that Respondent "receiv[ed] a FoodShare card that did not belong to [his] household and used it to buy food for unauthorized individuals".
5. The respondent failed to appear for the scheduled January 5, 2023 Intentional Program Violation (IPV) hearing and did not provide any good cause for said failure to appear.

DISCUSSION

An intentional program violation of the FoodShare program occurs when a recipient intentionally does the following:

1. makes a false or misleading statement, or misrepresents, conceals or withholds facts; or
2. commits any act that constitutes a violation of the Food Stamp Act, the Food Stamp Program Regulations, or any Wisconsin statute for the purpose of using, presenting, transferring, acquiring, receiving, possessing or trafficking of FoodShare benefits or QUEST cards.

FoodShare Wisconsin Handbook, § 3.14.1; *see also* 7 C.F.R. § 273.16(c) and Wis. Stat. §§ 946.92(2).

An intentional program violation can be proven by a court order, a diversion agreement entered into with the local district attorney, a waiver of a right to a hearing, or an administrative disqualification hearing, *FoodShare Wisconsin Handbook*, § 3.14.1. The petitioner can disqualify only the individual found to have committed the intentional violation; it cannot disqualify the entire household. Those disqualified on grounds involving the improper transfer of FS benefits are ineligible to participate in the FoodShare program for one year for the first violation, two years for the second violation, and permanently for the third violation. Although other family members cannot be disqualified, their monthly allotments will be reduced unless they agree to make restitution within 30 days of the date that the FS program mails a written demand letter. 7 C.F.R. § 273.16(b).

7 C.F.R. §273.16(e)(4) provides that the hearing shall proceed if the respondent cannot be located or fails to appear without good cause. The respondent did not appear or claim a good cause reason for not attending the hearing. Therefore, I must determine whether the respondent committed an IPV based solely on the evidence that the petitioner presented at hearing.

In order for the petitioner to establish that an FS recipient has committed an IPV, it has the burden to prove two separate elements by clear and convincing evidence. The recipient must have: 1) committed; and 2) intended to commit a program violation per 7 C.F.R. § 273.16(e)(6). In *Kuehn v. Kuehn*, 11 Wis.2d 15 (1959), the court held that:

Defined in terms of quantity of proof, reasonable certitude or reasonable certainty in ordinary civil cases may be attained by or be based on a mere or fair preponderance of the evidence. Such

certainty need not necessarily exclude the probability that the contrary conclusion may be true. In fraud cases it has been stated the preponderance of the evidence should be clear and satisfactory to indicate or sustain a greater degree of certitude. Such degree of certitude has also been defined as being produced by clear, satisfactory, and convincing evidence. Such evidence, however, need not eliminate a reasonable doubt that the alternative or opposite conclusion may be true. ...

Kuehn, 11 Wis.2d at 26.

Wisconsin Jury Instruction – Civil 205 is also instructive. It provides:

Clear, satisfactory and convincing evidence is evidence which when weighed against that opposed to it clearly has more convincing power. It is evidence which satisfies and convinces you that “yes” should be the answer because of its greater weight and clear convincing power. “Reasonable certainty” means that you are persuaded based upon a rational consideration of the evidence. Absolute certainty is not required, but a guess is not enough to meet the burden of proof. This burden of proof is known as the “middle burden.” The evidence required to meet this burden of proof must be more convincing than merely the greater weight of the credible evidence but may be less than beyond a reasonable doubt.

Further, the *McCormick* treatise states that “it has been persuasively suggested that [the clear and convincing evidence standard of proof] could be more simply and intelligibly translated to the jury if they were instructed that they must be persuaded that the truth of the contention is highly probable.” 2 *McCormick on Evidence* § 340 (John W. Strong gen. ed., 4th ed. 1992).

Thus, in order to find that an IPV was committed, the trier of fact must derive from the evidence a firm conviction as to the existence of each of the two elements even though there may be a reasonable doubt as to their existence.

In order to prove the second element, i.e., intention, there must be clear and convincing evidence that the FS recipient intended to commit the IPV. The question of intent is generally one to be determined by the trier of fact. *State v. Lossman*, 118 Wis.2d 526 (1984). There is a general rule that a person is presumed to know and intend the probable and natural consequences of his or her own voluntary words or acts. See, *John F. Jelke Co. v. Beck*, 208 Wis. 650 (1932); 31A C.J.S. Evidence §131. Intention is a subjective state of mind to be determined upon all the facts. *Lecus v. American Mut. Ins. Co. of Boston*, 81 Wis.2d 183 (1977). Thus, there must be clear and convincing evidence that the FS recipient knew that the act or omission was a violation of the FS Program but committed the violation anyway.

The agency contended that Respondent committed an intentional program violation on July 22, 2022 by colluding with his girlfriend, [REDACTED], to misuse or traffic Wisconsin FoodShare benefits from a third party’s ([REDACTED]) card while shopping at WalMart. The agency reviewed still shots created from video surveillance obtained from WalMart. Based on that review and based on a description of the actual video provided to the agency by WalMart staff, the agency determined that Respondent’s girlfriend handed him a FoodShare card that belonged to someone else, that he then swiped the FS card to complete two separate purchases, and that the food was not intended for the household to which the benefits were issued. However, the agency acknowledged that the card handed to Respondent had no name on it. Although the agency’s suspicion of Respondent is reasonable, I am not persuaded that Respondent’s presence with [REDACTED] when she was engaged in behavior constituting an intentional program violation or that his physical swiping of a FS card that did not have a name on it amounts to clear and convincing evidence that he engaged in an intentional program violation.

CONCLUSIONS OF LAW

For the reasons discussed above, there is no clear and convincing evidence that the respondent intended to commit an IPV.

NOW, THEREFORE, it is

ORDERED

That the petitioner's determination of an intentional program violation is reversed, and the petition for review is hereby dismissed.

REQUEST FOR A REHEARING ON GROUNDS OF GOOD CAUSE FOR FAILURE TO APPEAR

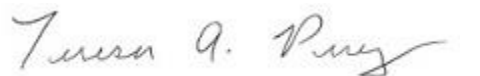
In instances where the good cause for failure to appear is based upon a showing of non-receipt of the hearing notice, the respondent has 30 days after the date of the written notice of the hearing decision to claim good cause for failure to appear. See 7 C.F.R. sec. 273.16(e)(4). Such a claim should be made in writing to the Division of Hearings and Appeals, P.O. Box 7875, Madison, WI 53707-7875.

APPEAL TO COURT

You may also appeal this decision to Circuit Court in the county where you live. Appeals must be filed with the Court **and** served either personally or by certified mail on the Secretary of the Department of Health Services, 1 West Wilson Street, Room 651, Madison, WI 53703, **and** on those identified in this decision as "PARTIES IN INTEREST" **no more than 30 days after the date of this decision** or 30 days after a denial of a timely rehearing request (if you request one).

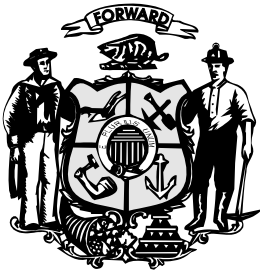
The process for Circuit Court Appeals may be found at Wis. Stat. §§ 227.52 and 227.53. A copy of the statutes may be found online or at your local library or courthouse.

Given under my hand at the City of Madison,
Wisconsin, this 3rd day of February, 2023



\sTeresa A. Perez
Administrative Law Judge
Division of Hearings and Appeals

c: East Central IM Partnership - email
Public Assistance Collection Unit - email
Division of Medicaid Services - email
Alicia Grube - email



State of Wisconsin\DIVISION OF HEARINGS AND APPEALS

Brian Hayes, Administrator
5th Floor North
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Madison, WI 53705-5400

Telephone: (608) 266-3096
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Internet: <http://dha.state.wi.us>

The preceding decision was sent to the following parties on February 3, 2023.

Outagamie County Department of Human Services
Public Assistance Collection Unit
Division of Health Care Access and Accountability
[REDACTED]